Supreme Court, U.S.
FILED
SEP 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 87-1043

# In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

*v.*

RON PAIR ENTERPRISES, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


Page

Cases:

*Best Repair Co.* v. *United States*, 789 F.2d 1080 (4th Cir. 1986) ..... 8
*Boston & Maine Corp., In re*, 719 F.2d 493 (1st Cir. 1983), cert. denied, 466 U.S. 938 (1984) ..... 9
*Chandler Bank* v. *Ray*, 804 F.2d 577 (10th Cir. 1986) ..... 13
*Commissioner* v. *Brown*, 380 U.S. 563 (1978) ..... 3, 6
*Estate of Lellock* v. *Prudential Ins. Co.*, 811 F.2d 186 (3d Cir. 1987) ..... 13
*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) ..... 2, 3
*Kelly* v. *Robinson*, 479 U.S. 36 (1986) ..... 10, 12
*Lindsey, In re*, 823 F.2d 189 (7th Cir. 1987) ..... 13
*Lorillard* v. *Pons*, 434 U.S. 575 (1978) ..... 11
*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982) ..... 11
*Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Protection*, 474 U.S. 494 (1986) ..... 10, 11, 12
*Porto Rico Ry. Light & Power Co.* v. *Mor*, 253 U.S. 345 (1920) ..... 6
*Simpson* v. *United States*, 435 U.S. 6 (1978) ..... 6, 7
*Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899) ..... 6, 7
*Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978) ... 3, 6
*United States* v. *Turkette*, 452 U.S. 576 (1981) ..... 3
*United States* v. *Wells Fargo Bank*, No. 86-1521 (Mar. 23, 1988) ..... 11
*United States Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, No. 86-1602 (Jan. 20, 1988) ..... 10, 12

Statutes:

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 *et seq.*:
§ 307(b), 98 Stat. 354 ..... 8
§ 316, 98 Stat. 356 ..... 7-8
§ 317, 98 Stat. 356 ..... 7
§§ 421-534, 98 Stat. 367-390 ..... 7
§ 448(a), 98 Stat. 374 ..... 7

Statutes – Continued: Page

Bankruptcy Code, 11 U.S.C. (& Supp. IV) 101 *et seq.*:
11 U.S.C. (Supp. IV) 101(45) ..... 5
11 U.S.C. (& Supp. IV) 506 ..... 4, 13, 14
11 U.S.C. (Supp. IV) 506(b) ..... *passim*
11 U.S.C. (Supp. IV) 506(d)(2) ..... 13
11 U.S.C. (Supp. IV) 523(d) ..... 8
11 U.S.C. (Supp. IV) 1322(b)(1) ..... 8
11 U.S.C. (Supp. IV) 1322(b)(2) ..... 5
11 U.S.C. (Supp. IV) 1325(a)(3) ..... 7

Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283, 100 Stat. 3116 ..... 8

Miscellaneous:

5 *Collier on Bankruptcy* (L. King 15th ed. 1988) ..... 7

H.R. Rep. 95-595, 95th Cong., 1st Sess. (1977) ..... 13, 14

S. Rep. 98-65, 98th Cong., 1st Sess. (1983) ..... 8, 13

# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1043

UNITED STATES OF AMERICA, PETITIONER

*v.*

RON PAIR ENTERPRISES, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

Section 506(b) of the Bankruptcy Code, 11 U.S.C. (Supp. IV) 506(b), provides that the holder of an oversecured claim is entitled to receive "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The natural, common-sense reading of this provision is that post-petition interest may be received by the holder of *any* oversecured claim, contrary to the decision below that the statute should be construed to restrict the recovery of interest only to the holders of liens created by agreement, *i.e.*, consensual liens. As we explained in our opening brief (at 14-19), the language of the statute, its grammatical structure (including the ordering of the phrases and its punctuation), and its context all support the natural import of its text, namely, that the holders of oversecured claims are entitled to post-petition interest, regardless of the source of the secured claim. This plain meaning of the statutory text should control unless there is a strong basis

for believing that it does not reflect congressional intent. See, *e.g., Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). As we further explained in our opening brief (at 20-37), there is no indication that Congress here intended to create a rule different from that established by the plain language and therefore no basis for departing from the statutory text.

Respondent advances no evidence showing that Congress did not intend the plain import of the statutory language to govern the receipt of post-petition interest. Nor does respondent assert that there is any logical reason that would have motivated Congress to draw a distinction, for post-petition interest purposes, between the holders of oversecured claims that were established by agreement and the holders of other oversecured claims. Instead, respondent argues that the apparent meaning of Section 506(b)—making interest available to the holder of any oversecured claim—should be disregarded because, according to respondent, that interpretation rests only on "punctuation, in particular the placement of two commas, which at best are unnecessary and at worst ungrammatical" (Resp. Br. 12). Respondent asserts that, if these commas are deleted, Section 506(b) could be naturally read to limit interest recovery to the holders of oversecured claims arising from consensual liens (Resp. Br. 12-13). Respondent then concludes that, "[i]n the face of the confusing commas, § 506(b)'s ambiguity, and the absence of any indication whatsoever that Congress intended, considered, or even contemplated changing the case law which preceded enactment of § 506(b)," the pre-Code court of appeals cases that recognized a distinction between consensual and nonconsensual liens "should continue to govern" (Resp. Br. 16). See also Amicus Br. 3-4, 10-11.



Respondent's approach totally inverts the correct method of determining the meaning of a statutory rule. When Congress addresses a particular issue by means of a specific statute, prior judge-made law does not "continue to govern"; it is the statute that governs and supersedes prior law. Even if the text of a statute arguably can support more than one interpretation, that is not a reason to abandon the statute and revert to prior judge-made law; rather, the statute still must be construed and applied. And the basic source for determining the meaning of the statute and of the congressional intent in enacting it is the statutory text—the "literal or usual meaning of its words." See *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 642 (1978); *Commissioner* v. *Brown,* 380 U.S. 563, 571 (1965). That meaning should be followed unless there is a strong reason for doubting that it reflects the intent of Congress—for example, if it produces an absurd result, renders the statute internally contradictory, or diverges from an intent that is clearly expressed in the legislative history. See, *e.g., United States* v. *Turkette,* 452 U.S. 576, 580 (1981); *Trans Alaska Pipeline Rate Cases,* 436 U.S. at 643. Thus, contrary to respondent's assertion and the court of appeals' reasoning (see Resp. Br. 16-17; Pet. App. 11a-12a), there is no need to look for an indication elsewhere that Congress meant what is said in the text of the statute; rather, in order to justify a departure from the apparent meaning of the words, it is incumbent upon respondent to show that that apparent meaning is "demonstrably at odds with the intentions of its drafters" (*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. at 571). Clearly, respondent has not carried that burden.

1. Respondent's discussion of the text of the governing statute (Br. 12-17) is confined to what it terms "the punctuation problem" (Br. 12; see also Amicus Br. 10-12).

Respondent asserts that the government's argument rests entirely on the punctuation of Section 506(b), and it then rejects that argument on the ground that punctuation is an unreliable guide to the interpretation of statutes (Br. 12). First, the premise of respondent's discussion is incorrect. As we explain in our opening brief (at 14-19), the punctuation of Section 506(b) is only one of several identifiable features of the provision indicating that its natural meaning is to make post-petition interest available to the holder of any oversecured claim. Section 506 is the general provision of the Bankruptcy Code dealing with secured claims, and its other subsections all apply to every kind of secured claim, including those arising from tax or other kinds of nonconsensual liens; it is incongruous to read Section 506(b) as not applying at all to secured claims arising from nonconsensual liens (U.S. Br. 17-18). The modifying clause upon which respondent relies—"provided for under the agreement under which such claim arose"—is placed where it ordinarily would not be construed to modify the allowance of interest (U.S. Br 15-17).[1] And the language

[1] Amicus invokes (Br. 8-10) an earlier version of Section 506(b) in an attempt to show that the "provided for under the agreement" clause modifies "interest," even though Congress placed it at the end of the subsection where it ordinarily would be regarded as modifying only the last antecedent (Amicus Br. 8). This legislative history, however, lends no logical support to amicus's conclusion. The assertion that this earlier version (*ibid.*) contained an additional modifying clause ("to the extent collectible under applicable law") that the drafters designed to apply both to interest and to other costs, fees, and charges provides no logical basis for concluding that the "provided for" clause, inserted in a different place in the statute, also was designed to modify both interest and other costs, fees, and charges. To the contrary, as we noted in our opening brief (at 23-24 n.9), to the extent this earlier version of the statute is probative at all, it shows that the drafters of Section 506(b) knew how to design a clause so that it modifies both interest and other costs, fees, and charges, if they so desired.



of the modifying clause is ill-suited to the purpose ascribed to it by respondent and the court of appeals. The phrase appears designed to identify other types of charges that will be allowed, *i.e.*, those specified in the agreement, but it does not address the type of lien involved; that would most logically have been accomplished by using the Bankruptcy Code's term of art for a consensual lien—a "security interest" (11 U.S.C. (Supp. IV) 101(45)) (U.S. Br. 18-19).[2] Thus, contrary to respondent's assertion (Br. 12), a mere change in the comma structure of Section 506(b) would not transform the provision into one that plainly establishes a distinction between consensual and nonconsensual liens.[3]

[2] Amicus objects to this point on the ground that, since Section 506(b) speaks in terms of claims, rather than liens, it would not have been logical for Congress to have used the term "security interest" (see Amicus Br. 14 n.16). That objection is unconvincing since Congress did use the phrase "secured only by a security interest" in 11 U.S.C. (Supp. IV) 1322(b)(2), which is a provision dealing with secured claims under a wage earner's plan, when it wanted to distinguish between the claims of the holders of consensual liens and those of the holders of nonconsensual liens.

[3] Amicus responds individually to each of our points on this issue (see Br. 9 n.6, 10-12, 12-13, 14 n.6), characterizing some as not probative and others as merely providing an "*aid* to" (Br. 13 (emphasis in original)) or "*inference* concerning" (Br. 10 n.6 (emphasis in original)) congressional intent that cannot establish the "plain meaning" of the statute. Like respondent's argument concerning commas, however, this attempt to divide and conquer is fundamentally misconceived. No particular component of a statutory provision is necessarily conclusive of its meaning, especially if it runs counter to other evidence of congressional intent. But the aggregate of the factors discussed in our opening brief is what yields the natural meaning of a statute. If a statutory provision has a common sense meaning that is supported by these factors, the provision has a plain meaning that should not be disregarded in the absence of strong contrary evidence of congressional intent. After all, if, as amicus apparently maintains, the words used in a statute, their order, the punctuation, and the context cannot

Second, the fact that the placement of commas or other punctuation is not generally a conclusive indicator of legislative intent does not mean that the punctuation chosen by Congress should be ignored. Since punctuation is used in legislation, as in other forms of written expression, to group words to convey a particular meaning, it should be presumed to have been used intentionally by Congress when it produces a reading of the statute that makes sense in the particular legislative context. To be sure, this Court has on a few occasions given a statute an interpretation that does not accord with what would be indicated by the punctuation. See, *e.g.*, *Simpson* v. *United States,* 435 U.S. 6, 11 n.6 (1978); *Porto Rico Ry. Light & Power Co.* v. *Mor,* 253 U.S. 345 (1920); *Stephens* v. *Cherokee Nation,* 174 U.S. 445 (1899). In each of those cases, however, the Court examined the context of the provision and concluded that the reading suggested by the punctuation made little sense and did not reflect congressional intent. See *Simpson,* 435 U.S. at 12 n.6; *Mor,* 253 U.S. at 348-349; *Cherokee Nation,* 174 U.S. at 480-481. These holdings are simply applications of the general principle that the natural or literal reading of a statute need not be followed if it would lead to " 'absurd results . . . or would thwart the obvious purpose of the statute' " (*Trans Alaska Pipeline Rate Cases*, 436 U.S. at 643 (quoting *Commissioner* v. *Brown*, 380 U.S. at 571)). In this case, by contrast, the punctuation and several other factors all indicate that post-petition interest may be received by the holder of any oversecured claim,[4] and that reading is *not*

be invoked to establish the meaning of the statute, there is little left with which to divine its meaning and therefore equally little left of the principle that the statutory text is the touchstone for determining congressional intent.

[4] There can be little doubt that the punctuation supplied by Congress in Section 506(b) does suggest that post-petition interest is



illogical or inconsistent with the purposes of the statute or the evident intent of Congress; to the contrary, it is the interpretation advanced by respondent that leads to the more anomalous result (see point 3, *infra*). Accordingly, there is no reason to ignore the punctuation supplied by Congress and depart from the natural reading of the statute.

To the extent respondent makes any affirmative argument that the statute should be read to support its interpretation, the argument rests entirely on the assumption that Congress intended to codify pre-Code decisional law. Starting with that assumption, respondent concludes that Section 506(b) was carelessly drafted and that two commas should be deleted in order to make the provision grammatically correct (Br. 13; see also Amicus Br. 10-11).[5] If

available to the holders of both consensual and nonsensual liens. In both *Simpson* and *Cherokee Nation*, this Court expressly acknowledged that the punctuation pointed to a different interpretation from the one the Court held to reflect the legislative intent. See 435 U.S. at 11-12 n.6; 174 U.S. at 480. Respondent makes the same admission here, stating that two commas must be deleted in order to make Section 506(b) "gramatically [*sic*] correct" under respondent's interpretation (Br. 13).

[5] If it were truly careless drafting and erroneous punctuation that caused the text of Section 506(b) to make post-petition interest available to the holder of any oversecured claim, there is reason to believe that Congress would have corrected the error. In 1984, Congress made many miscellaneous technical, stylistic, and clarifying amendments to the Bankruptcy Code. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 421-534, 98 Stat. 367-390. These changes included a stylistic change to Section 506(b) itself, inserting the word "for" in the final phrase. See Section 448(a), 98 Stat. 374; U.S. Br. 14 n.2. Congress also amended other sections in response to bankruptcy court decisions that were regarded as misconstruing congressional intent. See Section 317, 98 Stat. 356 ("good faith" standard of Section 1325(a)(3) distinct from question of debtor's ability to pay), discussed in 5 *Collier on Bankruptcy* ¶ 1325.04, at 1325-13 to 1325-13 to 1325-15 (L. King 15th ed. 1988);

one begins by examining the statutory text without making such an assumption, however, it is apparent that a drafter seeking to codify pre-Code decisional law could be expected to have used language very different from that chosen by Congess in Section 506(b). The provision as enacted contains a "provided for in the agreement" phrase that limits the types of costs or fees that can be recovered by the holder of an oversecured claim. Even if this phrase can reasonably be construed to modify the allowance of interest, which we dispute, the statute still would not track the pre-Code decisional law that respondent contends was intended to be codified. The cases on which respondent relies drew a distinction based on the method under which the security was obtained, *i.e.*, between consensual and nonconsensual liens; but they did not hold that it was necessary to look to the agreement to determine whether it specifically provided for interest. It would have been easy enough for Congress to have drafted Section 506(b) to codify those decisions beyond any doubt, simply by restricting the availability of post-petition interest to the

---

Section 316, 98 Stat. 356 (codebtor claims can be classified separately under Section 1322(b)(1)), discussed in S. Rep. 98-65, 98th Cong., 1st Sess. 17-18 (1983); see also Section 307(b), 98 Stat. 354 (attorney's fee recovery under Section 523(d) limited to cases where creditor's position not "substantially justified"), discussed in S. Rep. 98-65, *supra*, at 9-10. In 1986, Congress also made numerous technical corrections to the Bankruptcy Code. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283, 100 Stat. 3116. Although there were several bankruptcy court decisions that had already been held prior to the enactment of the 1984 legislation that post-petition interest was available to the holder of an oversecured claim based on a nonconsensual lien (see cases cited at U.S. Br. 19-20 n.7), and the Fourth Circuit had decided *Best Repair Co.* v. *United States*, 789 F.2d 1080 (1986), prior to the enactment of the 1986 Act, Congress took no steps to amend Section 506(b) to repair what respondent suggests was careless drafting.



holders of liens obtained by an agreement, a "security interest" in the Bankruptcy Code's lexicon (see U.S. Br. 18; page 5, *supra*). The fact that the drafters did not do this and instead used a phrase that modifies the types of costs that are recoverable strongly militates against finding that Congress intended to codify the pre-Code distinction between consensual and nonconsensual liens, even if Section 506(b) could conceivably be repunctuated and construed to support that conclusion.

Moreover, apart from the question of the availability of post-petition interest to the holders of nonconsensual liens, it is apparent that Section 506(b) does more than codify pre-Code decisional law. As we noted in our opening brief (at 35-36 n.15), the treatment of attorney's fees plainly departs from prior law to the extent that recovery is no longer subject to the vagaries of state law. And, with respect to interest, the pre-Code law relied upon by respondent suggested that the recovery of post-petition interest by the holder of a consensual lien was governed by the equitable considerations of the particular case. See U.S. Br. 26; Amicus Br. 25 & n.27; *In re Boston & Maine Corp.*, 719 F.2d 493, 496 (1st Cir. 1983), cert. denied, 466 U.S. 938 (1984). This equitable inquiry clearly has not survived the enactment of the Bankruptcy Code since, to the extent Section 506(b) allows post-petition interest to the holder of an oversecured claim, it does so categorically. If Section 506(b) as a whole does not codify pre-Code law, there is no reason to assume that it codified the pre-Code distinction between consensual and nonconsensual liens, when the statutory language does not draw such a distinction. In sum, the natural meaning of Section 506(b) is to allow post-petition interest to the holder of any type of oversecured claim, and only strong evidence of a contrary congressional intent would justify a departure from that reading.

2. The mere fact that the natural reading of Section 506(b) establishes a rule different from that adopted by some courts of appeals prior to the enactment of the Code does not provide a sufficient reason for disregarding the statutory text. And, contrary to the contentions of respondent (Br. 20-21) and amicus (Br. 20-24), there is no rule of construction to be derived from this Court's decisions in *Kelly* v. *Robinson*, 479 U.S. 36 (1986), and *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Protection*, 474 U.S. 494 (1986), that requires Section 506(b) to be construed as a codification of prior judge-made law. See U.S. Br. 30-37. As we explained in our opening brief (at 31-32), those decisions do not suggest that there must be some explicit indication outside the statutory text to justify departing from a prior judge-made rule; such an approach would largely swallow the bedrock principle that the primary guide to congressional intent is the text of the statute itself. Indeed, this Court's recent decision in *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, No. 86-1602 (Jan. 20, 1988), slip op. 13, adverts to *Kelly* and states that a "specific provision in the text of the statute" can demonstrate congressional intent to effect a major change in existing rules. Here, the "explicit" evidence of congressional intent to enact a rule that differs from pre-Code decisional law is provided in the plain terms of Section 506(b).

What *Kelly* and *Midlantic* do suggest is that the existence of prior case law that is at odds with the literal meaning of a statute necessitates caution in following that literal meaning; when there are strong reasons for believing that Congress did not intend to disturb the prior law, that circumstance can provide a basis for departing from the interpretation indicated by the text of the statute standing alone.[6] The Court's conclusion in both *Kelly* and

[6] Respondent (Br. 21) and Amicus (Br. 24) erroneously assert that the government in its brief in *Midlantic* took a position inconsistent with its position here, allegedly arguing that pre-Code law generally should be presumed to be codified in the Code. In fact, the government's argument in *Midlantic* was much narrower and entirely consistent with its position here. In *Midlantic*, the Code provision at issue had been derived from a Bankruptcy Rule that had codified a principle developed in the case law. In arguing that the Code provision incorporated the case law that had been codified in the Rule, the government's brief (at 16) relied upon *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-382 (1982), and *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978), for the fairly well-settled proposition that when Congress adopts a new law that incorporates a provision from an old statute, it is presumed to have adopted the existing judicial and administrative interpretations of that provision. That rule of construction simply reflects the fact that certain language can come to be understood to have a particular meaning when used by legislators, even if that meaning is not obvious when the language is examined in isolation. See, *e.g.*, *United States* v. *Wells Fargo Bank*, No. 86-1521 (Mar. 23, 1988), slip op. 4-5 (phrase "exempt from all taxation" was understood not to create an estate tax exemption). The argument made in the government's brief in *Midlantic* is entirely inapposite here where Section 506(b) did not adopt language used in a prior statute or rule (and, indeed, was a new provision designed to address for the first time by statute an area previously governed by judge-made rules).



*Midlantic* that Congress there did not intend to disturb prior decisional law in no way indicates that the same conclusion is appropriate here. In those cases, the statute (again dealing with bankruptcy) was not addressed to the (nonbankruptcy) subject of the prior judge-made rule at issue and hence there was reason to doubt that Congress had focused its attention on the result indicated by the plain meaning. Moreover, there were strong policy reasons for retaining the prior rule, and there were other indications that Congress would not have wanted to alter the preexisting rule. Hence, the Court found it sufficiently unlikely that Congress had intended to change the prior law that it concluded the statute should not be construed to do so. See U.S. Br. 32-35. This case is very different.

Here, the bankruptcy statute is directed to the same subject as the prior judge-made law at issue and there is accordingly every reason to believe that Congress was aware of the consequences of the plain meaning of its words. There is, moreover, no discernible policy or other reason for believing that Congress would have wanted to retain the old rule. In these circumstances, *Midlantic* and *Kelly* do not suggest that the statutory language here should be stretched to retain prior law.[7]

3. In our opening brief (at 20-21, 27-30), we also explained that there is no sound policy reason for the distinction between consensual and nonconsensual liens that the court of appeals has imported into Section 506(b). In particular, we noted that the justifications that had been advanced by the courts of appeals in the pre-Code cases for this distinction were no longer viable because of changes in the law and in commercial practices. Amicus argues (Br. 25-30) that these changes are irrelevant because they point to the conclusion that Congress should not have allowed post-petition interest to any holder of an oversecured claim, but do not suggest that interest should be allowed to holders of nonconsensual liens. But that objection is

[7] Amicus argues (Br. 23-24) that this Court's decision in *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd., supra*, which involved a core bankruptcy matter, indicates that the fact that *Kelly* and *Midlantic* involved important nonbankruptcy matters was immaterial to the decisions in those cases. Plainly, *United Savings* demonstrates nothing of the kind. In *United Savings*, the Court relied on the "plain textual indication" in concluding that Congress had not changed the pre-Code rule that an undersecured creditor does not receive post-petition interest, noting (with a cf. citation to *Kelly*) that such a change "would not likely have been made without specific provision in the text of the statute" (slip op. 13). The Court's conclusion that the text of the statute governed in *United Savings* manifestly does not support respondent's argument that the text of the statute should be discarded here in favor of adherence to pre-Code law.



beside the point. It is undeniable that Congress decided in Section 506(b) to allow a holder of an oversecured claim to receive post-petition interest. The only question here is whether that right should be extended to the holder of any oversecured claim or whether it should be restricted to the holders of consensual liens, as some pre-Code court of appeals decisions had held. Respondent and amicus do not dispute that the only reasons advanced by those courts to justify the distinction are no longer viable, and they do not offer any other justification. Thus, it is clear that considerations of policy and logic provide no basis for departing from the natural meaning of Section 506(b) on the theory that Congress intended to retain the distinction made in pre-Code decisional law.

Moreover, the intepretation urged by respondent and adopted by the court of appeals creates an anomaly in the structure of Section 506 that militates against construing Section 506(b) to draw a distinction between consensual and nonconsensual liens. Under Section 506(d)(2), when a secured creditor does not file a proof of claim in the bankruptcy proceeding (and no one files on his behalf), his lien survives; thus, Section 506(d) "permits liens to pass through the bankruptcy case unaffected" (H.R. Rep. 95-595, 95th Cong., 1st Sess. 357 (1977)). The effect of the provision is "to put the secured creditor who chooses to pursue his rights in bankruptcy in the same position that he would occupy if he had decided to bypass bankruptcy" (*In re Lindsey*, 823 F.2d 189, 191 (7th Cir. 1987)). See also, *e.g.*, *Estate of Lellock* v. *Prudential Ins. Co.*, 811 F.2d 186, 188 (3d Cir. 1987); *Chandler Bank* v. *Ray*, 804 F.2d 577, 579 (10th Cir. 1986); S. Rep. 98-65, 98th Cong., 1st Sess. 10 (1983).

Under respondent's proffered interpretation, this framework is disturbed because the holder of an oversecured claim that arises from a nonconsensual lien

will not occupy the same position in the bankruptcy proceeding that he would if he did not participate in the proceeding. In the latter case, he could foreclose on the collateral and receive the full value of the debt, including interest, but in the bankruptcy proceeding he would not be permitted to recover post-petition interest. Respondent's reading of the statute therefore would create an incentive for the holders of nonconsensual liens, such as tax liens or mechanic's liens, to bypass the bankruptcy proceeding and avoid the restriction on recovering interest from the collateral securing their claims. There is no reason to believe that Congress intended to create such an incentive to bypass bankruptcy, which could hamper the orderly handling of bankrupty estates. See H.R. Rep. 95-595, *supra*, at 181. Accordingly, the general policies underlying Section 506 also support the conclusion that Congress intended to enact the rule reflected in the plain meaning of Section 506(b), not to codify some prior judge-made law.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

SEPTEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60652